TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 108.

J. W. PERRY COMPANY AND JOHN L. ROPER, PLAINTIFFS IN ERROR,

vs.

THE CITY OF NORFOLK, VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED OCTOBER 29, 1906.

(21,419.)

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INDEX.

	Original.	Print
Petition for appeal and supersedeas	1	1
Record from circuit court of the city of Norfolk	11	9
Order granting injunction	12	10
Bill of complaint	12	10
Exhibit No. 1—Deed, James Taylor *et al.* and mayor, &c., of Norfolk, August 1, 1792	16	14
No. 2—Deed, Thomas Newton, recorder, &c., and Richard Evers Lee, June 21, 1797	18	15
No. 3—Deed, city of Norfolk and executors of Hare, May 15, 1895	22	19
Order for submission	26	22
Decree	26	22
Demurrer and answer	27	23
Clerk's certificate	29	24
Opinion by Harrison, J	30	25
Decree	39	29
Authentication of record	40	29
Petition for writ of error	41	30
Order allowing writ of error	41	31
Assignment of errors	42	31
Bond on writ of error	46	33
Writ of error	48	34
Citation and service	50	35
Return to writ of error	51	36

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1 In the Supreme Court of Appeals of Virginia, at Richmond.

CITY OF NORFOLK
v.
J. W. PERRY COMPANY et al.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, the City of Norfolk, a municipal corporation chartered under the laws of this State, respectfully represents unto your honors that it is aggrieved by a decree of the Circuit Court of the City of Norfolk, entered on the 6th day of May, 1907, in a certain suit in chancery wherein your petitioner was defendant and J. W. Perry Co., a corporation, and John L. Roper were complainants. A transcript of the record in said case is presented herewith and from it will appear the following facts:

In the year 1792 your petitioner, at that time the borough and not the City of Norfolk, was the owner of a large area of land in the present City of Norfolk known as Town Point Lands. In that year your petitioner laid off said lands under one general plan and leased said property under perpetual leases, that is leases for ninety-nine years renewable forever, to various individuals; some of said leases being dated in that year and some in years subsequent thereto. Among these leases was one made on the 21st day of June, in the year 1797, by which your petitioner, known then as the borough of Norfolk, leased to one Richard Evers Lee one of said lots known as lot No. 10, on the plat of said Town Point property at an

2 annual rent of six pounds and fifteen shillings, which, computed on the present value of United States money, amounted to $22.50, and said Richard Evers Lee, his executors, administrators and assigns as a further consideration for said lease further covenanted and agreed that they would pay or cause to be paid to the person or persons authorized to receive the same the public taxes which shall become due on said land. Said lease was for a term of 99 years, and after that time renewable for the further term of 99 years and so on forever. On the 15th of May, 1895, just before the expiration of the first 99 years of the aforesaid lease to Richard Evers Lee, your petitioner made a renewal, in accordance with the terms of said original lease, to the assigns of Richard Evers Lee, viz., Harriet McClellan and E. Spencer Miller, executor. Said renewal lease contained exactly the same terms as the original lease. By successive assignments the property covered by this lease became vested in the complainants J. W. Perry Co. and John L. Roper, and they have improved the same by the erection of costly buildings and improvements thereon. This property has always been taxed by the State and was duly assessed for taxation, and in the year

1906, the assessed value of said land for taxation was $21,000.00, and of the building upon said land was $6,500.00. The land was assessed in the name of the City of Norfolk for that year and the building in the name of J. W. Perry Company. In 1906, the City of Norfolk imposed a tax on said land amounting to $346.50, and on said building amounting to $107.25. In October, 1906, complainants filed their bill for an injunction against the collection of these taxes and the court, having granted a temporary injunction, by the decree appealed from, perpetuated the same and this is the decree by which your petitioner is aggrieved.

Complainants claim that the taxes levied by your petitioner were illegal on several grounds, as follows:

1. That the taxes were not assessed properly in that they were not assessed to the proper person, to-wit, the complainants, even if otherwise taxable; and in that the land and the building were assessed separately and this could not be done.

2. That the City of Norfolk being the technical fee simple owner of the land, and the building thereon following the land as a matter of course under the lease and becoming the property of the City of Norfolk, if the lease were violated, could not tax its own property or add to the burdens of its lessee by such taxation. In other words, that the city could not tax itself on its own property and that in law under the technical rule applicable to landlord and tenant this was the city's property and was therefore exempt.

3 3. That the covenant in the lease to pay all "public taxes" did not apply to city taxes because at the time it was made the city did not levy taxes on this property and that the covenant did not therefore apply to these taxes even if they were otherwise leviable.

4. That the levying of these taxes impaired the obligation of the contract of lease and such levy and assessment were unconstitutional.

It is proposed to consider these contentions in the order named.

1.

As to the first contention that the property was wrongfully assessed in the name of the wrong person and because the building was separated from the land, the first observation that your petitioner makes is that this could have been easily remedied by a motion to correct said assessments and to have them taxed in the proper names under the statute and that a court of equity has no jurisdiction to enjoin the collection of the taxes on this ground.

In Cooley on Taxation, (3d ed.) p. 1440, it is said:

"A tax will not be restrained on the ground merely that it is irregular or erroneous. Errors in the assessment do not render the tax void nor are they necessarily injurious. As a rule therefore they do not constitute any reason whatever against the taxes being enforced; moreover the law has provided remedies for all such mere irregularities and errors as do not go to the foundation of the tax and parties complaining must be confined to these."

Applying this law specifically we find the Supreme Court of the

United States in New Orleans v. Stempel, 175 U. S. pp. 309-11, using the following language:

"A preliminary question made by the plaintiff is that she had applied to have the assessment in the name of the estate of McCan stricken off on the ground that the administration of the estate had been finally closed and the property put into the possession of the heirs, which application was denied; that therefore the assessment was in the wrong name and could not be sustained. We are of opinion, however, that there was no error in the ruling of the Circuit Court in this respect, for, conceding that as a matter of fact the assessment was in the wrong name, the error is not one that will justify the equitable relief by injunction."

In Hibernian, etc. Soc. v. Kelly, (Ore.) 52 Am. St. Rep. 709, the same principle is laid down, the court saying:

"We understand the rule to be that a court of equity will not interfere by injunction to restrain the collection of a tax
4 merely because of the alleged illegality or irregularity appearing upon the face of the assessment, but will leave the party to his remedy at law."

And this was a case of failure to assess in the right name. These same principles apply to the failure to assess the land and building together instead of separately, and certainly if the land was taxed at a fair value complainants had no ground to complain as to the tax on land that it did not include the value of the building also, and even if the tax on the building should have been enjoined the tax on the land was valid and should have been paid. Again it is to be noted that courts of equity when called upon to enjoin a tax, partly legal and partly not, make it a condition of granting the injunction that the plaintiff shall pay and tender such taxes as are due legally. Says Cooley on Taxation (3rd ed.), pp. 1424–1427:

"Thus where an injunction has been applied for to restrain the collection of a tax partly legal and partly not, the court has made the payment of the legal a condition precedent and it has been strongly intimated in a case where it was alleged the assessment had by fraud been made too high that the payment of what the party conceded would be his just proportion should be required before injunction order issued in order that the proceedings may be as little as possible injurious to the public interest. The general rule requiring payment or tender of the amount actually due as a condition to relieve against the illegal part of the tax has, however, no application to a case where the entire tax fails by reason of an illegal (not irregular) assessment."

(The words in brackets above are ours.)

Considering therefore the condition of the complainants on the ground of irregularity in the assessment because assessed to the wrong owner and because the building and the land were assessed separately instead of together, it must be concluded, your petitioner thinks, that neither of these grounds furnishes a reason for relief by injunction.

2.

The second contention of the complainants—and the one on which the court below proceeded—is as purely a technical ground as might be imagined. Petitioner concedes the general rule that in the absence of a covenant and under ordinary leases the landlord is responsible for taxes on the property leased by him to the tenant although he is not responsible for an increase of taxation due by reason of improvements put upon the ground by the tenant. While this is the general rule petitoner contends and insists that it has no application to a case of a perpetual lease-holder where the tenant is in effect the real owner of the property and entitled to the use thereof forever, and where the tenant is the virtual owner of the land. In this latter case in matters of taxation the mere legal title, which remains in the landlord for purposes of security, is disragarded and the tax on the property placed where it belongs, viz., on the lessee who is the virtual owner, who has the benefit of any increase in the value of the land, who, as such, must bear all losses from depreciation in the value of the land and who, in truth and despite legal fiction, is the real and substantial owner. In other words, the contention of your petitioner is that these complainants, holding this land under perpetual lease, are the owners thereof, that the law will disregard the mere naked fiction of a legal title in the landlord and will place the burden on him who gets the benefit. Take the case at hand where property is rented for $22.50 a year and the taxes thereon amount to $453.75, in what position does a landlord find himself, where he can never get back his lot and where this increase in value goes always to benefit the tenant and where it is utterly impossible that he can ever reap the benefits proceeding from the appreciation of the value of the property. His legal title would be a burden instead of a benefit if such were the law. Not only is this true here, but we also have, as we shall show later on, a covenant to pay these taxes. A case almost in point on this question, the difference being merely one of degree, and that a very slight degree, is Wells v. Savannah, 181 U. S. 531. The facts of the case cited were, the City of Savannah in 1790, owned certain property known as common lots, and in that year took steps to dispose of the same. The manner of disposing of them adopted was that they were put up at public outcry and the highest bidder was to have the lots, but if the bidder instead of making a cash payment paid a ground rent quarterly he might retain the lot forever on the payment of such ground rent, and at any time thereafter might pay the original valuation with what rent was due, extinguish the ground rent and call for a fee simple, the city retaining a right of re-entry for non-payment of rent. The plaintiff in that case held a lot paying the ground rent with a right to purchase and while it was in this condition the City of Savannah levied a tax thereon and the question was whether the city could tax the property. The court will note that the legal title to that property was in the city, that the only relation existing between the owner and the city was that of landlord and tenant for-

ever, and under a perpetual lease as here, with a right or option in the tenant to purchase on certain conditions. The only difference in substance between that case and the case at bar was that the tenant there had a right to purchase and here he had none. There was also a covenant in that case on the part of the city that
6 the tenant should have quiet possession, etc. The Supreme Court of the United States held that the lands were taxable, saying on page 544:

"The purchasers of these lots became to all intent and purposes their owners, as they had the right to their possession, use and occupation forever upon payment of the rent and they could assign or devise the same and their assignees or devisees would take good title and their heirs would also take in case there was no assignee or devisee. They could also at their discretion and on the payment of the money agreed upon become the owners in fee."

The court also quotes what Chief Justice Bleckly had to say upon the question in the Supreme Court of Georgia, and, as it would be, presumptious to attempt an improvement in the statement of a legal proposition made by Chief Justice Bleckly, we quote a part of what the Supreme Court of the United States quoted from him in extenso. He says:

"The value of property consists in its use, and he who owns the use forever, though it be on a condition subsequent, is the true owner of the property for the time being. This holds equally of a city lot or of all land in the world. Where taxation is ad valorem, values are the ultimate objects of taxation, and they to whom the values belong should pay the taxes. Land sold or by a contract of bargain and sale demise forever subject to a perpetual rent, is taxable as corporeal property; and in private hands the rent also is taxable as an incorporeal hereditament. The tax on the former is chargeable to the purchaser or perpetual tenant, and on the latter to the owner of the rent. The corporeal property in such case is at the direct risk of the purchaser; he alone sustains the losses of depreciation in value, and he alone takes the benefit of appreciation. The vendor risks only the fixed rent or the fixed purchase money, and neither of these will ever become more or less by anything which may happen to the premises. Only his security, not his property, will be affected thereby. It is to be assumed that the whole contract between the parties will be observed, not broken, and their true relation to the property is to be determined on that assumption. Possession of real estate attended with an indefeasible right to occupy in perpetuity, and also with an indefeasible right to be clothed with the fee upon the voluntary payment of a fixed sum as purchase money, will constitute the purchaser the substantial owner of the property. So long as his possession, supplemented with these rights, continues, he is not a mere lessee but a purchaser admitted into possession on the faith of his contracts of purchase. Such were the contracts involved in the present
7 case, and under them the purchasers have the actual possession and use of the premises, with the right to hold forever, on condition of paying up the purchase money whenever they please, and until that time an annual ground rent due by quarterly in-

stalments, the amount of which is fixed by contract, and is the equivalent of interest at a moderate rate per annum on the unpaid purchase money. In all essential respects, so far as liability for taxes is concerned, these purchasers are in the position of ordinary purchasers in possession under a bond for title, and these last are chargeable with accruing taxes on lands so held."

It is to be noted that Chief Justice Bleckly says in this excerpt that the tax on the corporeal property, to-wit; the land, should be chargeable to the purchaser or tenant, and while it is true that in our case it is chargeable to the city or assessed in the name of the city, yet we have already shown, we hope, that this mere irregularity in assessment does not entitle the complainant to equitable relief.

If it is true therefore that a lessee under a perpetual lease is regarded as the owner of the corporeal property, the question as to the right of the City of Norfolk to tax property of which it has the legal title does not arise, because even if it was true that a city could not tax its own property the rule does not apply here for the simple reason that the complainants are the real owners and not the city, and the mere fact that the city holds the naked legal title should not preclude it on general principles from taxing the property. The reason for the rule that a city cannot tax its own property as laid down by all the authorities is that it would be a useless and idle thing and would only give tax officers fees without any benefit to the city, the city in such a case simply transferring money from itself to itself (if that were possible), and paying its officers fees for doing so. In Gray on Limitations of the Taxing Power, sec. 1340, the reason for the rule is stated thus:

"It would be manifestly absurd for the State to tax itself, to take the money out of its treasury with which to pay taxes back to the treasury, which is all such taxation would amount to."

And in Cooley on Taxation (3rd ed.), p. 263, in speaking of the exemption of public property from taxation the reason for the rule is stated thus:

"All public property is taxable, if the State shall see fit to tax it: but to levy a tax upon it would render necessary new taxes to meet the demand of this tax and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy."

8 But as before stated no such reason exists here for such a rule, because here the city does not pay the taxes but the lessee of a perpetual lease-hold, who is the virtual owner, and who holds under a covenant to pay all public taxes, would pay the city something and the city would derive a benefit and it would not be a case of a city taxing itself to pay itself taxes, and the maxim *"Ratio est legis anima, mutata legis ratione mutatur et lex,"* applies. It is not, however admitted but is on the contrary contended by your petitioner that under the present Constitution of Virginia a city is required to tax all property owned by itself and not held for public purposes. This basis of the rule exempting public property from taxation is that it is held for public purposes and when it is held for

private purposes and a revenue derived therefrom as in this case, the basis for the exemption fails, and the city in paying its taxes would pay from the revenue which it derived from property held in its private capacity, and that property should be considered in making up the tax rate in order that there might be equality and uniformity in taxation. This would be true, petitioner thinks, even under the law without the constitutional provision, and when the constitutional provision itself is considered it becomes doubly apparent. The constitutional provision referred to is sec. 183 of the Code which provides that no other property shall be exempt from taxation, State and local, except property directly owned by the State, however held, and property lawfully held and owned by counties, cities, towns or school districts used wholly and exclusively for county, city, town or public school purposes, and certain other property not having a bearing upon the questions in this case. This is a direct mandate of the constitution requiring the taxation of this property and it is only by a construction of the most hair-splitting kind that it can be avoided. As bearing upon this question it is to be noted that it is provided in sec. 183 of the Cons. that "nothing therein contained shall be construed as authorizing or requiring any county, city or town tax for county, city or town purposes, in violation of the rights of the lessee thereof existing under any lawful contract heretofore made, any real estate owned by such county, city or town and heretofore leased by it." This demonstrates that unless it violates the contract with the lessee, the city was required to tax property leased by it and there is no violation of the contract of lease in this case.

Before we leave the second contention of the complainants it is well to call attention to the point that certainly the building on this land was taxable to the lessee even under the general rule applicable to ordinary leases as to taxes between landlord and tenant. To say

9 that the building erected by a tenant under such a lease as this before default made and re-entry becomes the property of the lessor is fallacious in the extreme and the courts have always held even under ordinary leases that increase in taxation due to the erection of improvements by the lessee, should, to the extent of such increase, be paid by the lessee during the term. In 18 Amer. & Eng. Enc. of Law, (2nd ed.) p. 651, the general rule is laid down:

"When the taxable value of the premises is greatly enhanced by improvements erected by the lessee, the lessor is not bound, between himself and his tenant, to pay the additional taxes caused by such improvements; and if he is required to pay such additional taxes he may compel the lessee to reimburse him."

If this were not true it would result, as pointed out in Watson v. Home, 14 Eng. Com. Law, 45, that a tenant might so improve a lessor's property that the taxes would more than consume rents and the landlord, to speak in common parlance, would be in a hole. This principle has been recognized in Virginia in the case of Mayo v. Carrington, 19 Gratt. 74, where the syllabus is a- follows:

"The leased property when sold was only valuable for the sand

taken from it. The purchaser builds upon it and makes extensive improvements. He is entitled to deduct from the rent the taxes upon the property as he purchased it but not the taxes occasioned by his improvements."

The exact distinction we make here as to the building has been made in Louisiana in the case of Burbank v. Board, 27 Sou. 947, the syllabus of which is as follows:

"The plaintiff as lessee of the City of New Orleans having contracted to build upon two vacant and unimproved lots of ground certain specified buildings, as a part of the consideration of the lease in addition to money rent, the buildings to revert to the lessor on the termination of the lease at the expiration of twenty years, said buildings and improvements are subject to taxation by the city in the meantime."

This last case sustains our contention entirely that, during the currency of the lease at any rate, the buildings are the property of the lessee and he should pay taxes thereon.

It may be well also to observe at this point that the city could not increase its rent in levying this tax by placing upon the property any amount of tax it wished to. It had necessarily under the law to tax it at the same rate that was imposed on other real estate in the city based upon its value in the assessment for taxation for State purposes. It will also be noted in connection with this contention of complainants that Mr. Cooley, in one of the quotations which we have made from him, has decided that the State could tax
10 public property or give authority to a city to tax its public property if it desired to do so. And our court has decided (Norfolk v. Norfolk Landmark, &c. Co., 95 Va. 564) that the City of Norfolk might tax all subjects within its jurisdiction not withheld from taxation by the Legislature, whether the State taxes them or not, and under the authority thus given the City of Norfolk, it had the right to tax this property if it wished to, and we contend that under the Constitution of Virginia, sec. 183 above, it was compelled to tax it.

We conclude our observations on this contention by a reference to the case of Hart v. Cornwall, 14 Conn. 228, which is almost identical on this point. In that case the Legislature of Connecticut had granted the town of Cornwall a tract of land for the use of the ministry forever. About twelve years after this grant the town of Cornwall leased the land for the term of 999 years, free of all incumbrances, except all rents or public taxes that might arise thereon to be paid and satisfied by the lessee. The town taxed this land and a question arose as to the right of the town to tax. It seems that the town of Cornwall had the same power in Connecticut that the town of Norfolk has in Virginia. (Norfolk v. Norfolk Landmark Company, 95 Va. 564.) See opinion in the Cornwall case, pp. 233-234, and the court held that inasmuch as the State could tax it the city could tax it.

3.

We shall consider the third and fourth contentions of the complainants together.

The trial court did not uphold these contentions or pass upon them, but decided the case on the second contention which we have noted and in which we submit the court erred; but as these questions are still open it is necessary that we notice the same.

The covenant by the lessee to pay all public or other taxes not only covered taxes imposed at the time of the lease but all taxes to arise in the future which might be imposed under the law; and at any rate the city had no power to exempt these lands from taxation.

Whiting v. Town of West Point, 88 Va. 905.

That the words "public taxes" covered taxes levied by the City of Norfolk is clear. In Buffalo City Cemetery v. City of Buffalo, 46 N. Y. 506-510, the court says:

"We think that the current of the authorities in this State and in some of our sister States runs to this result; that public taxes, rates and assessments are those which are levied and taken out of the property of the person assessed for some public or general use or purpose in which he has no direct, immediate and peculiar interest;
11 being exactions from him toward the expenses of carrying on the government, either directly and in general that of the whole Commonwealth, or more immediately and particularly through the intervention of municipal corporations.

Your petitioner therefore submits that the court in the decree complained of erred and it therefore prays that an appeal and supersedeas from said decree may be allowed him and that said decree may be reversed and annulled and a decree entered dismissing or directing the dismissal of the complainants' bill, and it will ever pray.

CITY OF NORFOLK,
By JAMES F. DUNCAN, *Counsel.*

JAMES F. DUNCAN,
NATH'L T. GREEN,
For Petitioner.

I, Nathaniel T. Green, an attorney practicing in the Supreme Court of Appeals of Virginia, do hereby certify that in my opinion the decree complained of in the foregoing petition is erroneous and should be reversed and annulled.

Given under my hand this 29th day of July, 1907.

NATH'L T. GREEN.

Petition and record received July 30, 1907.

R. H. C.

AUG. 5, 1907.

Appeal and supersedeas. Bond $200.00.

R. H. CARDWELL.

To the clerk of Supreme Court of Appeals, Richmond, Va.

VIRGINIA:

Pleas before the Circuit Court of the City of Norfolk, at the Courthouse Thereof, on Monday, the 6th Day of May, in the Year 1907.

Be it remembered that heretofore, to-wit: In the Circuit Court of the City of Norfolk, on the 12th day of September, 1906, came the plaintiffs, J. W. Perry Company, a corporation, and
12 John L. Roper, praying for an injunction against the City of Norfolk, defendant, which was granted in the following words:

In Chancery.

J. W. PERRY COMPANY, a Corporation, and JOHN L. ROPER, Complainants,

v.

CITY OF NORFOLK, Defendants.

Upon motion of complainants, and for good cause shown, an injunction is awarded in accordance with the prayer of complainants' bill, restraining the said defendant City of Norfolk, its officers agents, servants and attorneys, and all other persons, from taking any steps toward the collection of the taxes and assessments in said bill mentioned until the further — of the court.

But this order shall not be effective until the complainants or one of them, or some one for them, shall first execute a proper injunction bond in the penalty of five hundred dollars before the clerk of this court with good security to be approved by the clerk conditioned to pay all such costs as may be awarded, and all such damages as may be incurred in case this injunction shall be dissolved. All of which is hereby certified to the clerk of this court to be entered in the chancery order book.

And at another day, to-wit: In the clerk's office of said Circuit Court, at the rules held for said court on the 1st Monday in October, 1906, came the plaintiffs and filed their bill in chancery against the defendants, the City of Norfolk, in the following words:

VIRGINIA:

In the Circuit Court for the City of Norfolk.

In Chancery.

J. W. PERRY COMPANY, a Corporation, and JOHN L. ROPER, Complainants,

v.

CITY OF NORFOLK, a Corporation, Defendants.

To the Hon. R. R. Prentis, judge of said court:

Your orators, J. W. Perry Company, a corporation, and John L.

Roper, respectfully show unto your honor the following case:

13 On the first day of August, in the year 1792, James Taylor and others, as directors and trustees of the land formerly called Fort Land, and then more generally known as the Town Point Company's Land, conveyed to Thomas Newton, mayor of the Borough of Norfolk, and certain other officers and councilmen, of the said Borough, the said land in the City of Norfolk known as the Town Point Company's Land, of which the particular lot hereinafter mentioned and described was a portion, in trust for the benefit and advantage of the said Borough, which said transaction will be more fully explained by reference to the deed conveying the said land, a copy of which is herewith filed as "Exhibit No. 1" as well as the acts of Assembly of Virginia pertaining thereto.

After the said conveyance upon the trust aforesaid, the said Borough of Norfolk by deed bearing date the 21st day of June in the year 1797, demised and leased unto one Richard Evers Lee, among other of said property, a lot on the plat of said Town Point property known as Lot No. 10, which said lot fronts sixty feet on the south side of Main Street and runs back in a southerly direction, between lines parallel, or nearly so, to Kelly Street in the rear. A copy of said deed of lease is herewith filed, marked "Exhibit No. 2," and asked to be read as a part of this bill.

Among the terms and stipulations of the said lease, the lessee for himself and his assigns agreed and undertook to pay unto the Borough of Norfolk and its successors an annual rent of six pounds and fifteen shillings, which computed on the present value of United States money is the equivalent of $22.50, and further agreed to pay to the person or persons authorized to receive the same all public taxes which should become due on said land, all of which stipulations, together with others, will be seen by reference to the copy of said deed of lease herewith filed as aforesaid.

By various mesne assignments the said leasehold estate conveyed by the original deed became vested in one Caroline Fleming Hare, and on the 15th day of May, in the year 1895, the said City of Norfolk, which had in the meantime succeeded to the rights and obligations of the said Borough of Norfolk, executed as provided in original lease, a renewal of said lease to Harriet Hare McClellan and E. Spencer Miller, executors of the said Caroline Fleming Hare, the latter having in the meantime died. A copy of the said renewal lease, marked "Exhibit No. 3," is herewith filed and asked to be read as a part of this bill.

By the terms of said renewal lease it is provided as in the original lease, that the lessee shall pay the yearly rent of $22.50,

14 and also pay to the person or persons legally authorized to receive the same, the public taxes which shall become due on the said land.

By various assignments the leasehold in and to said lot of land is now vested in your orators (the eastern portion of the same belonging to your said orator, John L. Roper, and the western portion of the same to your said orator J. W. Perry Company) who, relying on the stipulations and agreements contained in the said renewal

lease, have purchased the lease of said land and at great expense have improved the same by the erection of costly buildings and improvements thereon.

Your orators further allege that they as well as those who have preceded them in the ownership of the lease of said land have paid the said yearly rent for said lease as the same has accrued, and have paid the State taxes on the said land as same have likewise accrued from time to time. Your orators further state that they have otherwise kept and performed all the various covenants and stipulations of said lease which by the lease they were required to keep and perform.

Your orators would further state that it was the intention of all the parties thereto, in both the original and the renewal lease, that the stipulations as to the payment of public taxes applied solely to such taxes as might from time to time be imposed by the Commonwealth of Virginia and the United States of America. In pursuance of this intention the Borough of Norfolk and its legal successor, the said defendant, the City of Norfolk, have never heretofore, from the execution of the original deed of lease in the year 1797, up to the present year, ever attempted to impose or collect any burden in the form of a municipal tax or charge upon said property. The City of Norfolk is to-day the fee simple owner of said property, subject only to the lease held by your orators as aforesaid. Your orators on the purchase of the said property relied, as they had a right to do, upon this stipulation and the construction placed thereon by the said defendant, the City of Norfolk, through its servants and agents, which said stipulation entered into and became and was an essential part of their contract. Nevertheless, your orators charge that the said defendant, the City of Norfolk, in absolute disregard of its obligation, has for the year 1906, caused the said lot of land to be assessed in the name of it, the said City of Norfolk, upon a valuation of $21,000.00, and the said city taxes imposed thereon by virtue of said assessment, amounting to $346.50, your orators believe and therefore charge, that it is the purpose and intent of the said defendant, the City of Norfolk, to undertake to collect from your said orators as the lessees of said lot.

15 Your orators would further state that on the portion of the said lot belonging to your said orator, J. W. Perry Company, it has caused to be erected a brick building, the title to which by virtue of the said ownership by the said city of the said land, immediately vested in the said defendant, the City of Norfolk, and became and was, so far as your orator is concerned, subject to all the conditions and stipulations which attached to said land, and became and was likewise free and clear from the payment of all municipal taxes, so far as your said orator, J. W. Perry Company, is concerned. Nevertheless, your orators charge that the said defendant the City of Norfolk, in absolute disregard of its obligation, has for the year 1906 caused the said building as aforesaid to be assessed upon a valuation of $6,500.00, not to itself, but to your said orator J. W. Perry Company, and the city taxes imposed thereon by virtue of said assessment, amounting to $107.25, your orators believe and therefore charge that it is the purpose and intent of the said defend-

ant, the City of Norfolk, to undertake to collect from your said orators as the lessees of the said lot.

Your orators further allege that the said assessments and collection of said city taxes as aforesaid were and are illegal in that they are in absolute contravention of your orators' contract, under which your orators claim, and on which they rely, and that they impart obligation of said contract, contrary to the provisions of the Constitution of the United States.

Your orators further believe and charge that they will suffer irreparable damage in the enforcement of said illegal claims for city taxes unless the said City of Norfolk is enjoined and restrained from the collection of the same.

Your orators being without any adequate remedy at law, therefore pray that the said City of Norfolk may be made a party defendant to this bill and required to answer the same, but answer under oath is expressly waived, and that an injunction may be granted restraining the said City of Norfolk, its officers, agents, servants and attorneys, and all other persons, from taking any steps toward the collection of said taxes and assessments; that the same may be declared null and void — of no effect; and that your orators may have such further relief as the nature of their case may demand, and to equity shall seem meet.

And your orators will ever pray.

J. W. PERRY CO.,
By J. W. PERRY, *Pt.*

W. L. WILLIAMS AND
TAZEWELL TAYLOR,
Counsel for Complainants.

16 STATE OF VIRGINIA,
Corporation of the City of Norfolk, to-wit:

This day personally appeared before me Rosa T. Bilisoly, a notary public for the city and State aforesaid, J. W. Perry, president of the J. W. Perry Company, one of the complainants in the foregoing bill, and made oath that the facts contained in the said bill are true to the best of his knowledge, information and belief.

J. W. PERRY,
President J. W. Perry Co.

Subscribed and sworn to before me this 29th day of August, 1906.

ROSA T. BILISOLY,
Notary Public.

My commission expires July 12, 1910.

The following is "Exhibit No. 1," filed with the foregoing bill.

This indenture, made this 1st day of August, in the year of our Lord, 1792, between James Taylor, Cornelius Calvert Linn, Wilson Boush, Wm. Aitchison, Andrew Martin, Alex. Mosely, Donald Campbell, John Lawrence, Thomas Newton, Jr., Moses Myers, Edward Owens, Robert Taylor, George Loyall, Anthony Walke, George Kelly, John Nivison and Solomon Bull Talbott, directors and trustees of the land named in various acts of assembly as the Fort Land, but more generally called the Town Point Company's Land, of the one part, and the mayor, recorder, aldermen and common councilmen of the Borough of Norfolk of the other part:

Whereas, by and act of the general assembly of Virginia, the aforesaid land was placed under the management of sundry persons who were named and appointed trustees and directors according to the tenor of the said act; and

Whereas, by another act of assembly passed in the second year of the reign of George the Third, these trustees and directors, or the survivors of them, are directed and required to convey the said land and appurtenances to the mayor, recorder, aldermen and common councilmen of the Borough aforesaid for the benefit of the said Borough, upon their reimbursing the persons named in the schedule in the first mentioned act, or their heirs, executors, administrators or assigns, the several sums advanced by them, as by said schedule will appear, and

Whereas, the said succession of directors and trustees hath been continued by another act of assembly passed in the fifth year
17 of the same reign, under which authority the aforesaid persons have been appointed:

Now, this indenture witnesseth, that the aforesaid trustees and directors by virtue of the various acts of assembly herein recited, and in consideration of the sum of two thousand pounds, current money of Virginia, being the advances aforesaid, well and truly secured to be paid by the said mayor, recorder, aldermen and common councilmen and their successors, according to a contract for that purpose, have released and quit-claim for themselves and other proprietors, and by these presents do for themselves and the said proprietors, *do* release and quit-claim to the said mayor, recorder, aldermen and common councilmen, and their successors, in trust for the benefit and advantage of the said Borough all right, title and interest of themselves and the other proprietors to the said land called Fort Land or Town Point Company's Land, with all and singular the appurtenances to the same belonging or in any wise appertaining.

To have and to hold, unto them, the said mayor, recorder, aldermen and common councilmen, and their successors, in trust as aforesaid all right and title of them, the said trustees and directors and of the other proprietors, of, in or to the said land and premises with the appurtenances.

In witness whereof, the parties hereto have set their hands and seals this the day and year first written.

JAMES TAYLOR.	[SEAL.]
CORNELIUS CALVERT LINN.	[SEAL.]
WILSON BOUSH.	[SEAL.]
WM. AITCHSON.	[SEAL.]
ANDREW MARTIN.	[SEAL.]
ALEX. MOSELY.	[SEAL.]
DONALD CAMPBELL.	[SEAL.]
JOHN LAWRENCE.	[SEAL.]
THOMAS NEWTON, JR.	[SEAL.]
MOSES MYERS.	[SEAL.]
EDWARD OWENS.	[SEAL.]
ROBT. TAYLOR.	[SEAL.]
GEO. LOYALL.	[SEAL.]
ANTHONY WALKE.	[SEAL.]
GEORGE KELLY.	[SEAL.]
JOHN NIVISON.	[SEAL.]
SOLOMON BULL TALBOTT.	[SEAL.]

The following is "Exhibit No. 2" filed with the foregoing bill.

18 VIRGINIA:

In the Clerk's Office of the Corporation Court of the City of Norfolk, on the 10th Day of February, 1903.

The following deed having been lodged in this office and having remained therein six months without being acknowledged or proved so that it can be duly recorded is here by direction of Thos. H. Willcox and Tazewell Taylor, attorneys for F. Boyer Davis and other persons intended therein, copied for preservation as provided by all 111th section of chapter 2508 of the Code of 1887.

This indenture made the twenty-first day of June, in the year of our Lord one thousand seven hundred and ninety-seven, between Thomas Newton, recorder of the Borough of Norfolk for and in behalf of the mayor, recorder and aldermen, John Calvert, Thomas Blanchard, Moses Meyers, —— McPherson & John Woodsides, for and in behalf of the common Council of the said borough of the one part, and Richard Evers Lee of the said borough of the other part.

Whereas, the Common Council of the said Borough of Norfolk, in Common Hall assembled did by their order bearing date the twenty-third day of April, in the year, one thousand seven hundred and ninety-two, aforesaid appoint Thomas Matthews, James Nimmo, John Smallwood, John Calvert and Phillip Ritter, as commissioners, for and in behalf of the corporation of the said Borough of Norfolk, to treat with and purchase of the Town Point Company, the whole of that piece or parcel of land, commonly called and known by the name of the Townpoint *point* land (the greatest part of which was then covered with water).

And whereas the said commissioners, or a majority of them, afterwards in pursuance of the said appointment, did purchase of the trustees of the said Town Point Company the whole of the said land, at the price of two thousand pounds as by their deed for the same bearing date the — day of ——, will appear.

And whereas, the said Common Council of the Borough of Norfolk in Common Hall assembled, did by their other order of the thirty-first day of May, in the same year direct that John Calvert, Phillip Ritter, John Woodsides, John Smallwood, John Ingram and James Nimmo, or any three should advertise and let out the said Town Point Land in lots agreeable to a plan thereof received by the said Common Council and now remaining of record with the clerk of the Borough Court of Norfolk.

And whereas the said last mentioned commissioners, agreeable to the aforesaid order (after the same was duly advertised) 19 did lease out at public auction, the whole of the aforesaid lots for ninety-nine years, renewable forever (as by their report, made in writing to said Common Council, on the twenty-fourth day of August in the year one thousand seven hundred and ninety-two, will appear) at which auction the said Richard Evers Lee became the highest bidder for lots No. ten, eleven, twelve and twenty-one, at the following prices, to-wit: No. ten at the annual rent of six pounds, fifteen shrillings; No. eleven at six pounds; No. twelve at sixty-six pounds, fourteen shillings & No. twenty-one at one pound, nine shillings & two pence; amounting in the whole to the sum of eighty pounds, eighteen shillings and two pence annually.

And whereas at a court of aldermen, summoned and held on the twenty-third day of January, one thousand seven hundred and ninety-seven

The said court did authorize & empower the s'd Thomas Newton, recorder, for and in behalf of the mayor, recorder and aldermen to join with a committee of the said Common Council or any one of their body, in conveying the said Town Point Land, and in consequence thereof the said Common Council in Common Hall assembled, did by their order of the 15th day of June, 1797, authorize and empower the said John Calvert, Thomas Blanchard, Moses Myers, Daniel McPherson and John Woodside or any three of them for and in behalf of the said Common Council, to join with the said Thomas Newton, as recorder of the said Borough of Norfolk, in conveying the *the* said Town Point Land to the several lessees agreeable to the report made by the commissioners on the 24th day of August, 1792.

Now this indenture witnesseth that the said Thomas Newton as recorder for and in behalf of the mayor, recorder and aldermen and their successors, and the said John Calvert, Thomas Blanchard, Moses Myers, —— McPherson and John Woodside for and in behalf of the said Common Council and their successors for and in consideration of the yearly rent and covenants hereafter in and by these presents, named, mentioned and contained on the part and behalf of the said Richard Evers Lee, to be paid, done and performed. They, the said Thomas Newton, John Calvert, Thomas Blanchard,

Moses Myers, Daniel McPherson and John Woodside, in behalf of the body corporate of the Borough of Norfolk aforesaid *hence* demised, leased and to farm let and by these presents, do demise, lease and to farm let, unto the said Richard Evers Lee the whole of the lots hereinbefore mentioned, distinguished and known in a plan of the said Town Point Land by No. 10, 11, 12, & 21, and bound as follows, to-wit:

20 Beginning No. 10 and eleven at the intersection of No. 10 with the Main Street and Lot No. 9, running thence *thence* southwesterly one hundred and eleven feet on the line of lot No. 9, to Kelly street, thence westerly on said street one hundred and twenty feet, to Washington Street, thence northerly and easterly one hundred and — feet to the Main street, thence easterly one hundred and twenty feet to the beginning. Lot No. 12 beginning at the intersection of Lee Street and Washington Street, running southwesterly on Washington Street one hundred feet more or less to the channel of Elizabeth River, thence westerly along the channel of said river, one hundred and sixteen feet, to the public landing, thence northerly along the public land forty-eight feet more or less to Lee Street, thence easterly along Lee Street one hundred feet to the beginning & No. 21, beginning on the Main Street at the corner of Lot*t* No. 20, thence along the line of Lot*t* No. 20, one hundred and nineteen feet to Kelly Street, thence along Kelly Street fifty feet to Mathews Street, thence along Mathews Street one hundred and twenty feet to the Main Street, thence along the Main Street fifty feet, to the *the* beginning.

To have and to hold the said lot*s* No. 10, 11, 12 & 21, pieces or parcels of land, situate as aforesaid with their appurtenances, unto the said Richard Evers Lee his executors, administrators and assigns from the 26th day of August one thousand seven hundred and ninety-two, for and during the term of ninety-nine years, and after that time renewable for the further term of ninety-nine years, and so on forever; the said Richard Evers Lee yielding and paying therefor yearly and at the end of every year during the said term to the mayor, recorder, aldermen and Common Council of the said Borough — to their successors, the yearly rent or sum of eighty pounds, eighteen shillings & two pence.

And the said Richard Evers Lee for himself, his executors, administrators and assigns, doth covenant, promise and agree to and with the said Thomas Newton, John Calvert, Thomas Blanchard, Moses Myers, Daniel McPherson, John Woodside, in behalf of the mayor, recorder, aldermen and Common Council of the Borough of Norfolk aforesaid, that he the said Richard Evers Lee, his executors, administrators and assigns, shall and will yearly, and at the end of each year during the aforesaid term of ninety-nine years, pay or cause to be paid to the mayor, recorder aldermen and Common Council & their successors, the said yearly rent of eighty pounds, eighteen shillings and two pence, and further that he, the said Richard Evers Lee, his executors, administrators and

21 assigns will pay or cause to be paid to the person or persons authorized to receive the same the public taxes which shall

become due on said land. And the said Richard Evers Lee for himself, his heirs, executors, administrators or assigns doth also agree to and with the said Thomas Newton, John Calvert, Thomas Blanchard, Moses Myers, Daniel McPherson and John Woodside in behalf of the mayor, recorder, aldermen and Common Council of the Borough of Norfolk aforesaid, that if the said annual rent or sum of eighty pounds, eighteen shillings & two pence shall be in arrears, with the taxes thereon for the space of three years at any time during the said term of ninety-nine years, that then and in that case, it shall and may be lawful for the mayor, recorder, aldermen and Common Council aforesaid & their successors, and to and for any other person or persons, duly authorized by them to advertise and lease out the said lots of land or any one of them, with all the improvements thereon for the remainder of the said term of ninety-nine years, and that he, the said Richard Evers Lee, his executors, administrators or assigns will pay up and make good the deficiency (if any) between the first and last prices together with arrears of rent and taxes to the mayor, recorder, aldermen and common council or to any person or persons duly authorized by them to receive the same. The said Thomas Newton, John Calvert, Thomas Blanchard, Moses Myers, —— McPherson and John Woodside promising and agreeing for and in behalf of the mayor, recorder, aldermen and Common Council aforesaid, that the overplus (if any) between the first and last pieces shall be paid to the said Richard Evers Lee, his heirs executors, administrators or assigns, and the said Thomas Newton, John Calvert, Thomas Blanchard, Moses Myers, Daniel McPherson and John Woodside doth further covenant and agree, for and in behalf of the mayor, recorder, aldermen and common council of the Borough of Norfolk aforesaid and their successors, to and with the said Richard Evers Lee, his heirs, executors, administrators and assigns, that if the rent and taxes that may become due thereon, shall be paid so as not to leave three years, rent and taxes in arrears at any one time during the said ninety-nine years that then and after that period, the said mayor, recorder, aldermen and common council, or their successors, shall and will renew the said lease for the further term of ninety-nine years, and so on forever.

In witness whereof the said Thomas Newton, John Calvert, Thomas Blanchard, Moses Myers, Daniel McPherson and John Woodside for and in behalf of the said mayor, recorder, aldermen and common council of the said borough of Norfolk, and the
22 s'd Rich'rd E. Lee interchangeably have hereunto set their hands & seals the day & year first herein written.

Signed, sealed and delivered in presence of,

THOS. NEWTON, *Recorder.* [SEAL.]
JOHN CALVERT, [SEAL.]
THOMAS BLANCHARD. [SEAL.]
MOSES MYERS, [SEAL.]
JOHN WOODSIDE. [SEAL.]
[SEAL.]
RICH'D E. LEE. [SEAL.]

A copy—Teste:
CORA V. GRIFFIN, *D. C.*

The following is "Exhibit No. 3" filed with the foregoing bill.

Deed Book 115 B, page 126.

This indenture, made this 15th day of May, in the year A. D., 1895, between the City of Norfolk in the Commonwealth of Virginia, party of the one part, and Harriet Hare McClellan, executrix, and E. Spencer Miller, executor, of Carolina Fleming Hare, deceased, of the City of Philadelphia, and State of Pennsylvania, as hereinafter set out, parties of the other part.

Whereas, by a certain indenture of lease, bearing date the 21st day of June, 1797, to be found in the clerk's office of the Corporation Court of the City of Norfolk, by and between the mayor, recorder and alderman of the Borough of Norfolk, of the one part, and Richard E. Lee, of the other part, the Borough of Norfolk did demise, lease and to farm let unto the said Richard E. Lee along with certain other property, the following described lots or parcels of land, viz: Lots Nos. 10, and 11, as distinguished and known in the plan of the Town Point Lands, and bounded and described as follows, to-wit; beginning No. 10 and 11 and the intersection of No. 10 with Main street and lot No. 9, and running thence southwesterly 111 feet along the line of Lot No. 9 to Kelly Street; thence westerly along said street 120 feet to Washington Street; thence northerly and easterly 100 feet to the Main street; thence easterly along Main street 120 feet to the beginning.

To have and to hold the said lots, pieces or parcels of land, with their appurtenances, unto the said Richard E. Lee, his executors, administrators and assigns, from the 26th day of August,
23 1792, for and during the term of ninety-nine years, and after that time renewal for the further term of ninety-nine years, and so on forever; the said Richard E. Lee yielding and paying therefor yearly and at the end of every year during the said term to the mayor, recorder, aldermen and common council of the said Borough and to their successors, the yearly rent of six pounds and fifteen shillings, or $22.50 in United States money for said lot No. 10, and six pounds, or $20.50 in United States money for said lot No. 11; and

Whereas, by sundry mesne assignments, to-wit; a deed of assignment of lease from Moseley Sergeant, etc., to W. H. Foster, dated March 25th, 1815; deeds of assignment of lease from John E. Holt and Richard Drummond, trustees, to John Tabb, dated January 3rd, and January 6th, 1818; John P. Tabb and others, and Tazewell Taylor, special commissioner, to Thomas Donaldson, trustee, dated March 25th, 1869; Thomas Donaldson, trustee, to R. H. Hare dated January 26th, 1874; R. H. Hare and wife to John J. Donaldson and Fred B. Donaldson trustees, dated April 26th, 1884; John L. Donaldson and Fred B. Donaldson, Trustees, to Caroline Fleming Hare, May 12th, 1888; by which said last named conveyance the said lots 10 and 11 were sold and assigned to the said Caroline Fleming Hare, who was the holder and owner thereof at the time of her death; and

Whereas, the said Caroline Fleming Hare departed this life after the execution of the deed of lease aforesaid, and also after having

made, published and declared her last will and testament, which is duly recorded in the clerk's office of the Corporation Court of the City of Norfolk, in will book No. 10, at page 524, in which said will she nominated and appointed the said Harriet Hare McClellan and E. Spencer Miller her executrix and executor, respectively, who have duly qualified as such in the Corporation Court of the City of Norfolk, and

Whereas, the original term of the said lease expired on the 26th day of August, 1891, and the personal representatives of the said Caroline Fleming Hare are entitled to have the same renewed to them according to the terms and conditions of the original lease; and whereas, upon the petition of the said Harriet Hare McClellan, executrix, and E. Spencer Miller, executor, to the common and select councils of the City of Norfolk (which has succeeded to all the rights and responsibilities of the said Borough of Norfolk) setting forth their ownership of the said lease and asking for the renewal thereof, it was resolved on May 7th, 1895, by the common
24 council, and on the 14th day of May, 1895, by the select council of the City of Norfolk, that the presidents of the common and select councils of the said city be authorized and directed to execute and deliver on behalf of the said City of Norfolk to the said Harriet Hare McClellan, executrix, and E. Spencer Miller, executor, their personal representatives and assigns, a renewal of the lease hereinbefore mentioned and recited, for another term of ninety-nine years, renewal forever, according to the terms and provisions thereof, in such form as may be approved by the city attorney, and the treasurer of the said city be authorized and directed to affix the seal of the said city to such renewal of lease at and upon the execution thereof by the presidents of said councils, all of *of* which will more fully appear by reference to the records of the proceedings of the said councils; and

Whereas, Thomas W. Shelton, attorney for the City of Norfolk, had approved this form of lease, as is shown by his certificate hereto affixed;

Now, therefore this indenture witnesseth, that the said City of Norfolk for and in consideration of the yearly rents and covenants herein and by these presents reserved, mentioned and contained, and on the part of the said Harriet Hare McClellan, executrix, and E. Spencer Miller, executor, of the said Caroline Fleming Hare, deceased, to be done and performed, the said City of Norfolk has demised, lease- and to farm let, and by these presents doth demise, lease and to farm let, unto the said Harriet Hare McClellan, executrix, and E. Spencer Miller, executor, of the said Caroline Fleming Hare, deceased, and to their executors, administrators and assigns, the said two lots of land hereinbefore mentioned and described, and known as lots Nos. 10 and 11 on the plan of the said Town Point Lands as aforesaid.

To have and to hold the said lots, pieces or parcels of land, Nos. 10 and 11 as aforesaid, with their appurtenances, situated as aforesaid, unto Harriet Hare McClellan, executrix, and E. Spencer Miller, executor, as aforesaid, their executors, administrators and assigns,

from the 26th day of August, 1891, for and during the term of ninety-nine years fully to be complete and ended, and after that time renewal for the further term of ninety-nine years, and so on forever, the said Harriet Hare McClellan, executrix, and E. Spencer Miller, executor, as aforesaid, yielding and paying therefor yearly and at the end of every year during the said term to the said City of Norfolk the yearly rent of $22.50 for the said lot No. 10, and $20.50 for
25 the said lot No. 11. And the said Harriet Hare McClellan, executrix, and E. Spencer Miller, executor, as aforesaid, for themselves, their executors and administrators and assigns, do covenant, promise and agree to and with the said City of Norfolk, that they, the said Harriet Hare McClellan, executrix, and E. Spencer Miller, executor, shall and will yearly and at the end of every year, during the aforesaid term of ninety-nine years, pay or cause to be paid to the said City of Norfolk, the said yearly rent of $22.50 for the said lot No. 10 and of $20.50 for lot No. 11; that they will pay or cause to be paid, to the person or persons legally authorized to receive the same the public taxes which shall become due on the said land and the said Harriet Hare McClellan, executrix, and E. Spencer Miller, executor, of Caroline Fleming Hare, deceased for themselves, their personal representatives, and assigns, do covenant and agree to and with the said City of Norfolk that if the annual rents aforesaid, or any part thereof, shall be in arrears with the taxes thereon, for the space of three years at any one time during the said term, that then and in that case, it shall and may be lawful for the said City of Norfolk, its proper agents and officers, to at once lease out the said lots of land, or either of them, with all the improvements thereon for the remainder of the said term of ninety-nine years, and that they the said Harriet Hare McClellan, executrix, and E. Spencer Miller, executor, as aforesaid, their personal representatives and assigns, shall and will pay up and make good the deficiency, if any, between the first and last prices together with the arrears of rent and taxes, to the said City of Norfolk, to the person or persons duly authorized by the said city to receive the same, but if there is any overplus between the first and last prices, the same shall be paid to the said Harriet Hare McClellan, executrix, and E. Spencer —— executor, as aforesaid, their personal representatives or assigns.

And the said City of Norfolk covenants and agrees with the said Harriet Hare McClellan, executrix, and E. Spencer Miller, executor, as aforesaid, their personal representatives and assigns, that if the rents and taxes that may become due on the said lots of land shall be paid so as not to leave three years' rent and taxes in arrears at any one time during the said term of ninety-nine years, that then and after that period the said City of Norfolk shall and will renew the said lease for the further term of ninety-nine years, and so on forever.

In witness whereof, John L. Roper, president of the common council, and James L. Winston, president of the select council of the City of Norfolk, have hereunto set their hands, and W. W. Hunter,

treasurer of the said city, has hereunto affixed the seal of the
26 said city and said parties of the second part have hereunto set their hands and seals this 15th day of May, 1895.

JOHN L. ROPER,
President of the Common Council.
JAS. L. WINSTON,
President of Select Council.
HARRIET HARE McCLELLAN, [SEAL.]
Executrix of Caroline F. Hare.
E. SPENCER MILLER, [SEAL.]
Executor of Caroline F. Hare.

I have examined and approved the foregoing form of lease. Norfolk, Virginia, April 20, 1895.

THOMAS W. SHELTON,
City Attorney.

And at another day, to-wit: In the Circuit Court aforesaid on the 17th day of December, 1907:

On motion of J. W. Perry Company, a corporation, and John L. Roper, each by counsel, and by consent of J. W. Perry Company, a corporation, and John L. Roper, and the City of Norfolk, a corporation, each by counsel, in term time, now entered of record, it is ordered by the court that this cause be submitted to the judge of this court for such decision and decree, judgment or order therein, in vacation, as might be made in term.

ROBERT R. PRENTIS.

And now at this day to-wit: In the Circuit Court aforesaid, on the 6th day of May, 1907:

This day the defendant, City of Norfolk, appearing by council, comes and moves for leave to file its demurrer and answer to the bill of complaint hereinbefore filed, which motion being granted, said demurrer and answer is accordingly filed, in which demurrer the complainants by counsel join, and this cause coming on to be again heard upon the papers formerly read, and upon the demurrer and answer of the said defendant, City of Norfolk, was argued by council.

Whereupon, the court upon due consideration doth overrule said demurrer, and being further of opinion that *that* the said complainants are entitled to a perpetual injunction, as contained in the prayer of the bill of complaint herein filed, doth adjudge, order
and decree that the said defendant, City of Norfolk, its
27 officers, agents, servants and attorneys, and all other persons, be, and they are, perpetually restrained and enjoined from taking any steps toward the collection of the taxes and assessments as set out in said bill of complaint, herein filed, and that the same are adjudged and declared to be null and void, and of no effect so far as the complainants personally or their interests in the property particularly set out and described in said bill of complaint are con-

cerned. And it is further adjudged, ordered and decreed that the plaintiffs recover of the defendant their legal costs.

And the purposes of this suit having been acomplished, it is ordered that the same be stricken from the docket.

ROBERT R. PRENTIS.

The following is defendant's demurrer and answer filed herein by leave of the foregoing decree:

The Demurrer and Answer of the City of Norfolk to a Bill of Complaint Exhibited Against Itself in the Circuit Court for the City of Norfolk by J. W. Perry Company, a Corporation, and John L. Roper, Complainants.

The said defendant, the City of Norfolk, says that the said bill of complaint is not sufficient in law.

And without waiving its said demurrer, but expressly insisting upon the same for further answer to said bill, the said City of Norfolk answering says: It admits the execution and delivery to it by the directors and trustees of the Town Point Company's land of the deed filed as "Exhibit No. 1," mentioned in said bill.

It admits the execution by the Borough of Norfolk on the 21st day of June, in the year 1797, of the lease and demise of lot No. 10 on the plat of the Town Point property to Richard Evers Lee; and that a proper description of said property and of the terms and stipulation on which the same was leased to said Richard Evers Lee will appear from copy of said lease filed as "Exhibit No. 2" with complainants' bill, but it does not admit the construction of said stipulations or terms of said lease made by the complainants in their bill.

It admits that said leasehold estate demised to said Richard Evers Lee became vested in Caroline Fleming Hare, and that on the 15th day of May, 1895, the City of Norfolk, as successor of the Borough of Norfolk, made a renewal of said original lease to the executors of said Caroline Fleming Hare. Respondent also admits that "Exhibit No. 3" filed with complainants' bill is a correct copy of said renewal lease, and the terms and stipulations thereof will appear therefrom, and so far as the allegations of complainants' bill are consistent with said lease, same are admitted, but not otherwise.

28 Respondent admits that complainants are assignees of said renewal lease and that they have erected, at great expense, costly buildings and improvements on said land.

Your respondent does not admit that the complainants or their predecessors in title have paid all the rent or taxes accruing on said property, or that they or their predecessors have performed all the covenants and stipulation- of said lease which it was their duty to perform.

Respondent further denies that it was ever the intention of any of the parties to said leases, either original or renewal, that the stipulations as to the payment of public taxes therein contained should

apply solely to taxes imposed by the Commonwealth of Virginia, and the United States of America, and it further denies that the City of Norfolk has ever attempted to impose or collect any municipal taxes or charges upon this property. Respondent admits that the City of Norfolk is technically the fee simple owner of said property, subject to the lease held by the complainants, but it avers that the real ownership of said property is in the complainants who have a perpetual lease thereon. Respondent denies that complainants relied upon anything, except the lease itself in purchasing the same and respondent alleges that the lease itself embodies the only contract between these parties. Respondent admits that it has caused the lot of land held by the complainants to be assessed with city taxes for the year, 1906, in the name of the City of Norfolk, and that said tax is correctly set forth in said bill, and further admits that it is the purpose and intent of respondent to collect the taxes on said lot from the complainants as lessees of the same. Respondent made said asessment in direct compliances with the constitution and the laws of the State of Virginia, and it insists that under the leases aforesaid, as well as under the general principles of the law outside of the stipulations in said leases, that the complainants are liable for and should pay said taxes.

Respondent admits the erection of the brick building on said lot as set forth in said bill, but it denies that said building became, was or is free and clear from the payment of municipal taxes thereon; but, on the contrary, it avers that said buildings are subject to taxation and that the same are properly taxed to the complainants and should be paid by said complainants under their lease, even if there were no stipulations in the lease requiring the complainants to pay the same. Respondent admits the assessment of said building for taxation as set out in said bill, and the amount of taxes assessed thereon for the year, 1906, and declares its intention to undertake to collect the same from the complainants. Respondent further says that
29 said assessments and taxes are legal; that they are not in contravention of any contract of complainants, or of any one through whom they claim, and it denies that said taxes impair the obligation of any contract whatsoever. Respondent further denies that the complainants will suffer any irreparable damages on account of said taxes.

And now having fully answered, respondent prays to be hence dismissed with its reasonable costs in this behalf expended.

And it will ever pray.

[Seal of the City of Norfolk.]

THE CITY OF NORFOLK,
By JAS. G. RIDDICK, M.D., *Mayor.*

VIRGINIA:

In the Clerk's Office of the Circuit Court of the City of Norfolk, on the 29th Day of June, 1907.

I, Laurence Waring, Clerk of the Circuit Court of the City of Norfolk, do hereby certify that the foregoing is a true abstract of the

record in the suit of J. W. Perry Company, a corporation, and John L. Roper, plaintiffs, against the City of Norfolk, defendant, lately pending in the Circuit Court of the City of Norfolk.

I further certify that the same was not made up and completed until the plaintiffs' counsel had received due notice of the making of the same and of the intention of the defendant to appeal.

Teste:

LAURENCE WARING, *Clerk.*

Fee for this record, $10.80.

A copy—Teste:

H. STEWART JONES, *C. C.*

30 Circuit Court of City of Norfolk.

CITY OF NORFOLK
v.
PERRY COMPANY, &c.

Opinion by Judge George M. Harrison.

RICHMOND, VA., *March* 12, 1908.

In the year 1792, the appellant, then the Borough of Norfolk, was the owner of an area of land within the limits of the present City of Norfolk. In that year it laid off this land into lots and leased the same to various individuals for ninety-nine years, renewable forever. Among these leases was one executed in June, 1797, by which there was leased to one Richard Evers Lee lot No. 10, at an annual rental of six pounds and fifteen shillings, or $22.50 in United States money, the lessee, as a further consideration, covenanting for himself, his executors and assigns, to "pay or cause to be paid to the person or persons authorized to receive the same the public taxes which shall become due on said land." This lease was for a term of ninety-nine years, renewable for a further term of ninety-nine years, and so on forever.

In May, 1895, before the expiration of the original lease, the City of Norfolk, in accordance with its terms, executed a re-
31 newal thereof to the Executors of Caroline F. Hare, she having been in her lifetime the owner of all the rights of the original lessee. This renewal lease contained the same terms as the original lease.

By successive assignments, the property covered by this lease has passed to and become vested in the appellees, J. W. Perry Co. and John F. Roper, who have improved the same by the erection of valuable buildings thereon.

This property has been assessed for taxation by the State and such taxes have been regularly paid without protest. In the year 1906 the land was assessed for taxation at $21,000, and the buildings thereon at $6,500. The land was assessed for that year in the

name of the City of Norfolk, and the buildings thereon in the name of the appellee, J. W. Perry Co.

In the year 1906, the City of Norfolk imposed a tax of $346.50 on the land, and a tax of $107.25 on the buildings. Thereupon the appellees filed this bill for an injunction against the collection of these taxes by the City of Norfolk, upon the ground that they were illegal and in contravention of the contract, under which they claim.

A temporary injunction was awarded, which was followed by
32 the decree appealed from perpetually enjoining the City of Norfolk, its agents, &c., from the collection of the taxes complained of.

While technically the relation of landlord and tenant exists between the City of Norfolk and the appellees, under the terms of the contract of June 1797, to which we have adverted, it is manifest that the appellees are the substantial and real owners of the property upon which the tax in question is assessed. They have the right of possession, use and occupation forever, upon payment of the stipulated rent of $22.50 per annum, and they can assign or devise the same, and their heirs will take in case there is no assignee or devisee. In all essential respects, so far as liability for taxes is concerned, appellees are in the position, with respect to this property that the ordinary fee simple owner would be. It is true that, as a general rule, in the absence of a covenant, the landlord under an ordinary lease is responsible for taxes on the property leased by him; but this general rule can have no application to the case of a perpetual lease-holder where the tenant is in effect the virtual owner of the property and entitled to its use forever. In such a case, certainly for the purposes of taxation, the mere legal title re-
33 maining in the landlord will be disregarded and the burden of taxation placed where it belongs, upon the lessee to whom the value and the benefit belongs.

As said by Mr. Justice Bleckley, in a similar case which is quoted with approval by the Supreme Court: "The value of property consists in its use, and he who owns the use forever, though it be on condition subsequent, is the true owner of the property for the time being. This holds equally of a city lot or of all land in the world. Where taxation is *ad valorem*, values are the ultimate objects of taxation, and they to whom the values belong should pay the taxes." *Wells v. Savannah*, 181 U. S. 531, 544.

Looking to the official action of the governing body of the Borough of Norfolk, in its ordinances or resolutions, providing for these perpetual leases, which are recited in the lease contract under consideration, and to the terms of the contract itself, we fail to find any reference to the matter of exempting this property from taxation. Instead of such a stipulation, there is in the deed of lease made by the Borough to the several lessees a clause directly negativing the idea that it was intended to grant a perpetual exemption of this property from the burden of taxation, borne in common by all other property holders. This clause obligates the les-
34 see, "his executors, administrators and assigns to pay or cause to be paid to the person or persons authorized to receive

the same the public taxes which shall become due on said land."

The appellees insist that the term, "public taxes," employed by the parties in this covenant, had reference only to State taxes, and was not intended to include the city taxes now sought to be collected, because at that time a municipal tax on land was unknown. It might be argued with equal force that it could not have been contemplated by the parties, at that early day, that the property, now worth thousands of dollars, in a large and rapidly growing city, should bear no part of the common burden necessary to secure the innumerable advantages and benefits enjoyed by all the citizens of a well regulated, modern municipality. The word "public," as applied to taxes in this covenant, is broad enough to embrace the taxes then imposed or which might thereafter be lawfully imposed upon other land owners in that community. The word has no such fixed or settled meaning as necessarily to exclude city taxes from the term "public taxes." The word public is used variously, depending for its meaning upon the subjects to which it is applied.

35 In *Buffalo City Cemetery v. City of Buffalo*, 46 N. Y. 506, 510, the court says: "We think that the current of the authorities in this State and in some of our sister States runs to this result: that public taxes, rates and assessments are those which are levied and taken out of the property of the person assessed for some public or peneral use or purpose, in which he has no direct, immediate or peculiar interest; being exactions from him toward the expenses of carrying on the government, either directly and in general that of the whole Commonwealth, or more immediately and particularly through the interventin of municipal corporations."

We are of opinion that the covenant, in the case at bar, by the lessee, to pay all "public taxes" which shall become due on the land, not only covered taxes imposed at the time of the lease, but all taxes arising in the future that might be assessed by any lawful authority.

The appellees insist that the interpretation of the contract of lease suggested by them is evidenced by the conduct of the municipal authorities in failing to tax the property in the past. Mere

36 non-user by a government of its power to levy a tax, it matters not for how long continued, can never be construed into a forfeiture of the power. Whatever the practice of the city hitherto may have been, the mandate of the Constitution is, that all property shall be taxed save that exempt by constitutional authority; and that all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. Const. 1902, secs. 168, 183. That this mandate may have been heretofore disregarded is no reason why it should be disobeyed now. *Wells v. Savannah, supra.*

Based upon the contention that the property here involved belongs to the City, as lessor, it is insisted by the appellees that the City of Norfolk has no power to tax its own property. Ordinarily the State does not tax its own property, but it has the power to tax it if it sees fit to do so. Cooley on Taxation (3rd ed.), p. 263. And this would be true also of a city having general powers of taxa-

tion as the City of Norfolk has. *Norfolk v. Norfolk Landmark*, 95 Va. 564.

The reason governments of a State or city do not tax their own property is, that it would render necessary new taxes to meet
37 the demands of such a tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy. *Cooley on Taxation, supra.*

If, however, it were true that a city could not tax its own property, the rule would not apply in this case, for the reason that here, as already seen, the city is practically the holder of the mere legal title, while the appellees are the substantial and beneficial owners. Here the collection of the taxes would not be a vain thing, because the city does not pay the taxes, but they are paid by the lessee of the perpetual leasehold estate, who is the virtual owner, and the city gets the benefit of such taxes in common with all other taxes collected by it.

It is further contended by the appellees that the buildings put upon the land by the lessees cannot be assessed separately in their names, but that the land and buildings should be assessed together in the name of the lessor.

If it were conceded that the mode of assessment adopted was wrong, and that suggested by the appellees proper, it would be harmless error. The city had, under the law, to tax the property at the same rate that was imposed upon other real estate
38 within its territorial jurisdiction, based upon its valuation in assessing for purposes of State taxation. It is not claimed that the taxes would be less if the mode of assessment suggested by the appellees was adopted, nor is it perceived that the mode of assessment objected to has in any way affected or prejudiced their rights. If having both the land and the buildings assessed in the name of the lessor be of advantage to the appellees, and they have the right to have them so assessed, their remedy at law, by motion, is adequate to have the assessment corrected in that particular.

For these reasons we are of opinion that no right of the appellees, under their lease contract, has been violated by the tax imposed by the City of Norfolk, and, therefore, the decree appealed from, enjoining the collection of such tax, is erroneous and must be reversed. And this court proceeding to enter such decree as the circuit court should have entered, it is ordered that the temporary injunction granted herein be dissolved, and that the complainants' bill be dismissed.

Reversed.

39 VIRGINIA:

In the Supreme Court of Appeals, Held at the Library Building, in the City of Richmond, on Thursday, the 11th Day of March, 1908. *190*

CITY OF NORFOLK, Appellant,
against
J. W. PERRY COMPANY, a Corporation, and JOHN L. ROPER, Appellees.

Upon an Appeal from and Supersedeas to a Decree Pronounced by the Circuit Court of Norfolk County on the 6th Day of May, 1907.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that no right of the appellees, under their lease contract, has been violated by the tax imposed by the city of Norfolk, and that the decree appealed from enjoining the collection of such tax is erroneous. It is therefore adjudged, ordered and decreed that the said decree be reversed and annulled, and that the appellant recover of the appellees its costs by it expended about the prosecution of its appeal and supersedeas aforesaid here.

And this court proceeding to pronounce such decree as the said circuit court ought to have pronounced, it is adjudged, ordered and decreed that the temporary injunction granted herein be and the same is hereby dissolved, that the bill of the complainants be dismissed, and that the defendant recover of the complainants its costs by it about its defence in said circuit court expended.

Which is ordered to be certified to the said Circuit Court.

A copy.

Teste:

H. STEWART JONES, *C. C.*

Appellant's costs, $75.91.
Certified July 3rd, 1908.

40 In the Supreme Court of Appeals of Virginia, at Richmond.

CITY OF NORFOLK
v.
J. W. PERRY, a Corporation, and JOHN L. ROPER.

STATE OF VIRGINIA,
City of Richmond, To-wit:

I, H. Stewart Jones, Clerk of the Supreme Court of Appeals of the State of Virginia, at Richmond, do hereby certify that the writings annexed to this certificate, contained in twenty-nine printed

pages and one page of index, and ten additional manuscript pages, are true copies of the originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

In witness and attestation whereof, I hereunto set my hand and affix the seal of said court at Richmond, Virginia, on this the 9th day of November, 1908.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia, at Richmond.

STATE OF VIRGINIA,
City of Richmond, To-wit:

I, James Keith, President and one of the Judges of the Supreme Court of Appeals of the State of Virginia, do hereby certify that the foregoing is the true and genuine signature of H. Stewart Jones, Clerk of the said Court, and that the foregoing attestation made by him is in due form.

Witness my hand and seal this the 9th day of November, 1908.

JAMES KIETH, [SEAL.]
President.

STATE OF VIRGINIA,
City of Richmond, To-wit:

I, H. Stewart Jones, Clerk of the Supreme Court of Appeals, at Richmond, do hereby certify that the Honorable James Kieth, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same, one of the Judges and President of the Supreme Court of Appeals of Virginia, duly commissioned and qualified.

Witness my hand and the seal of said court, this the 9th day of November, 1908.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk Supreme Court of Appeals of the State of Virginia.

41 Supreme Court of Appeals of the State of Virginia.

CITY OF NORFOLK, Appellant,
v.
J. W. PERRY COMPANY, a Corporation, and JOHN L. ROPER, Appellees.

Petition for Writ of Error.

Considering themselves aggrieved by the final decision of the Supreme Court of Appeals of Virginia in rendering judgment against them in the above entitled case, the appellees, J. W. Perry Company, a Corporation, and John L. Roper, hereby pray a writ

of error from the said decision and judgment to the Supreme Court of the United States.

Assignments of error herewith.

TAZEWELL TAYLOR,
WILLIAM LEIGH WILLIAMS,
WALTER H. TAYLOR,
Attorneys for J. W. Perry Company, a Corporation, and John L. Roper, Appellees.

STATE OF VIRGINIA,

Supreme Court of Appeals.

Let the writ of error issue upon the execution of a bond by J. W. Perry Company, a corporation, and John L. Roper to the City of Norfolk in the sum of One Thousand Dollars, said bond, when approved, to act as a supersedeas.

Date this 9th day of Nov. 1908.

JAMES KEITH,
President of the Supreme Court of Appeals of the State of Virginia.

42 In the Supreme Court of Appeals of the State of Virginia.

CITY OF NORFOLK, Appellant,
v.
J. W. PERRY COMPANY, a Corporation, and JOHN L. ROPER, Appellees.

Assignments of Error.

Come now the Appellees in the above entitled cause and show that in the record and proceedings in said cause the Supreme Court of Appeals of the State of Virginia erred to the grievous injury of the Appellees herein, and to the prejudice and against the rights of the said Appellees in the following particulars, to-wit:

1st. The said Supreme Court of Appeals of the State of Virginia erred in holding that, under the pleadings and proofs submitted in this cause, there was a contract or agreement whereby J. W. Perry Company, a corporation, and John L. Roper, the Appellees, or their predecessor in title, agreed to pay the taxes assessed by the City of Norfolk on the land and buildings in the pleadings and proofs mentioned, and in further holding that the attempt to impose said taxes upon, and collect the same from, the said Appellees, in pursuance of the Constitution and laws of the State of Virginia passed subsequent to said contract did not impair the obligation of the contract existing between the said Appellees, as the successors in title to the original party thereto, and the Appellant, the City of Norfolk, in contravention of the terms of the Constitution of the

United States, and especially Article 1, Section 10, of the same.

43 2nd. The said Supreme Court of Appeals of the State of Virginia erred in holding that, under the pleadings and proofs submitted in this cause, there was authority vested in the City of Norfolk, Appellant, as the taxing power, to collect the said taxes on the land and buildings in the pleadings and proofs mentioned from the J. W. Perry Company, a corporation, and John L. Roper, Appellees, and in failing to find that said alleged authority, together with any provisions of the Constitution of the State of Virginia, the Acts of the General Assembly of the State of Virginia, the charter of the City of Norfolk, Virginia, and the ordinances and resolutions of the councils of the said City of Norfolk, Virginia, passed subsequent to said contract, conferring or attempting to confer such authority, are void, as impairing the obligation of the contract between the said J. W. Perry Company, a corporation, and John L. Roper, Appellees, and the said City of Norfolk, Appellant, in violation of Article 1, Section 10, of the Constitution of the United States, and also in failing to find that said contract, even though it had reference to City taxes, only gave the City of Norfolk, upon the failure of the said J. W. Perry Company, a corporation, and John L. Roper, the Appellees, to pay the same, a right of action based upon the said contract, and no right to distrein or levy on the goods and property of the said Appellees in advance of a judgment, as has been threatened and attempted by the officers and servants of the said City of Norfolk, the Appellant, in pursuance of the Constitution and laws of the State of Virginia, passed subsequent to said contract, thereby impairing the obligation of said contract in violation of Article 1, Section 10, of the Constitution of the United States.

3rd. The said Supreme Court of Appeals of the State of Virginia erred in holding that no right of the said J. W. Perry Com-

44 pany, a corporation, and John L. Roper, the Appellees, under their lease contract has been visited by the tax imposed by the City of Norfolk, but, on the contrary, it should have held that the same impairs the obligation of the contract existing between the said J. W. Perry Company, a corporation, and John L. Roper, the Appellees, and the said City of Norfolk, the Appellant, in violation of Article 1, Section 10, of the Constitution of the United States.

4th. The said Supreme Court of Appeals of the State of Virginia erred in not affirming the judgement of the trial Court, and in not giving the Appellees their rights under Article 1, Section 10, of the Constitution of the United States prohibiting any State from passing any law impairing the obligation of contracts.

5th. The said Supreme Court of Appeals of the State of Virginia erred in holding that the tax in question did not violate the implied terms of the demise from the City of Norfolk, the Appellant, or its predecessors in title, to said J. W. Perry Company, a corporation, and John L. Roper, the Appellees, or their predecessors in title, for the reason that a demise is a contract on the part of the lessor

that the lessee shall have quiet and peaceable possession of the premises granted, free from any act or acts committed by, or on behalf of, the said lessor, said tax thereby imparing the obligation of said contract in violation of Article 1, Section 10, of the Constitution of the United States prohibiting any State from passing any law impairing the obligation of contracts.

Wherefore, for these and other manifest errors appearing in the record, the said J. W. Perry Company, a corporation, and John L. Roper, the Appellees, pray that the judgment of the said Su-
45 preme Court of Appeals of the State of Virginia be reversed and set aside and held for naught, and that judgment be entered for the Appellees, granting them their rights under the Constitution of the United States, and the Appellees also pray judgement for their costs.

TAZEWELL TAYLOR,
WILLIAM LEIGH WILLIAMS,
WALTER H. TAYLOR,
Attorneys for J. W. Perry Company, a Corporation, and John L. Roper, Appellees.

46 Supreme Court of the United States.

J. W. PERRY COMPANY, a Corporation, and JOHN L. ROPER, Plaintiffs in Error,
v.
CITY OF NORFOLK, Defendant in Error.

Bond.

Know all men by these presents: That we, J. W. Perry Company, a Corporation, and John L. Roper, as principals, and W. B. Bassette, Edgar Nash and J. W. Perry as sureties, are held and firmly bound unto the City of Norfolk, Virginia, in the sum of One Thousand Dollars ($1000.00), to be paid to the said City of Norfolk, for which payment, well and truly to be made, we bind ourselves, jointly and severally, by these presents.

Sealed with our seals and dated this 28 day of October, 1908.

Whereas, the above named plaintiffs in error seek to prosecute their writ of error to the Supreme Court of the United States to reverse a judgment rendered in the above entitled suit by the Supreme Court of Appeals of Virginia;

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute their said writ of error to effect, and answer all costs and damages that may attach, if they shall fail to make good their plea, then this obligation to be void; otherwise to remain in full force and effect.

[Seal J. W. Perry Company, Norfolk, Va. Incorporated 1893.]
J. W. PERRY COMPANY,
By J. W. PERRY, *President.*

[Corporate Seal.]

Attest:
LUTHER W. WHITE, *Secretary.*

47

JOHN L. ROPER. [L. S.]
W. B. BASSETT. [L. S.]
EDGAR C. NASH. [L. S.]
J. W. PERRY. [L. S.]

STATE OF VIRGINIA,
Corporation of the City of Norfolk, ss:

W. B. Bassett Edgar Nash and J. W. Perry, being each duly sworn, on oath depose and say: We are each of lawful age, and are citizens of the State of Virginia, and know the contents of the foregoing instrument, to which we have attached our names, and we each for himself say we are worth the sum of One Thousand Dollars, over and above all debts, liabilities and exemptions.

W. B. BASSETT.
EDGAR NASH.
J. W. PERRY.

Subscribed and sworn to before me this 28 day of October, 1908.

[Seal Thos. W. Tannor, Notary Public, Norfolk, Va.]

[Official Seal.]

THOS. W. TANNOR,
Notary Public.

My Commission Expires Mar. 5th 1911.

The above bond is approved.

JAMES KEITH,
President of the Supreme Court of Appeals of the State of Virginia.

The original of the foregoing supersedeas bond was lodged with the Clerk of the Supreme Court of Appeals of the State of Virginia on Nov. 9", 1908, and the following endorsement made thereon:

"Bond filed Nov. 9", 1908."

H. STEWART JONES,
Clerk of the Supreme Court of Appeals of the State of Virginia, at Richmond.

48 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Supreme Court of Appeals of the State of Virginia:

Because in the record and proceedings, as also the rendition of judgment in a plea which is in the said Supreme Court of Appeals of Virginia, before you, at the March Term, 1908, thereof, between the City of Norfolk, Appellant, versus J. W. Perry Company, a Corporation, and John L. Roper, Appellees, a manifest error has happened, to the great damage of the said J. W. Perry Company, a Corporation, and John L. Roper, Appellees, as by their complaint ap-

pears, we being willing that error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid at the City of Washington, D. C., and filed in the office of the Clerk of the United States Supreme Court on or before thirty days from the date hereof, to the end that the record and proceedings aforesaid, being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 9th day of Nov.
49 1908.

Done in the City of Richmond, with the seal of the Circuit Court of the United States for the Eastern District of Virginia attached.

[Seal United States Circuit Court, Eastern Dist. of Virginia, Fourth Circuit.]

JOSEPH P. BRADY,
Clerk of the Circuit Court of the United States for the Eastern District of Virginia.

Allowed:

JAMES KEITH,
President of the Supreme Court of Appeals of the State of Virginia.

Writ of error filed Nov. 9", 1908.

The original of the foregoing writ of error was lodged with the Clerk of the Supreme Court of Appeals of the State of Virginia on Nov. 9", 1908, and also at the same time placed a copy thereof for the City of Norfolk. The following endorsement was made upon said original writ and upon the copy:

Writ of error filed Nov. 9", 1908.

H. STEWART JONES,
Clerk of the Supreme Court of Appeals of the State of Virginia, at Richmond.

50 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the City of Norfolk, Virginia, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of Appeals of Virginia, wherein J. W. Perry Company, a Corporation, and John

L. Roper are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the President of the Supreme Court of Appeals of the State of Virginia, this 9th day of Nov. 1908.

JAMES KEITH,
President of the Supreme Court of Appeals of the State of Virginia.

[SEAL.]

Attest:

H. STEWART JONES,
Clerk of the Supreme Court of Appeals of the State of Virginia.

NORFOLK, VA., *November 11th*, 1908.

I, Nath'l T. Green, attorney of record for the defendant in error, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

NATHANIEL T. GREEN,
Attorney for the City of Norfolk, Virginia.

51 UNITED STATES OF AMERICA,
Supreme Court of Appeals of Virginia, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of Appeals of the State of Virginia in the City of Richmond, this 9th day Nov., 1908.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk of the Supreme Court of Appeals of the State of Virginia, at Richmond.

Endorsed on cover: File No. 21,419. Virginia Supreme Court Appeals. Term No. 103. J. W. Perry Company and John L. Roper, plaintiffs in error, vs. The City of Norfolk, Virginia. Filed November 18th, 1908. File No. 21,419.